DOCUMENT RESUME

ED 140 323 CS 203 459

AUTHOR	Hunsaker, David M.
TITLE	The Print Media and Equal Time.
INSTITUTION	Freedom of Information Center, Columbia, Mo.
REPORT NO	FOI-0016
PUB DATE	Apr 75
NOTE	8p.; Some parts may be marginally legible due to small print of the original document
EDRS PRICE	MF-$0.83 HC-$1.67 Plus Postage.
DESCRIPTORS	*Censorship; Civil Rights; *Constitutional Law; *Freedom of Speech; Legal Problems; *News Media; *Newspapers; *Publishing Industry; Supreme Court Litigation
IDENTIFIERS	*Freedom of Information; Libel

ABSTRACT

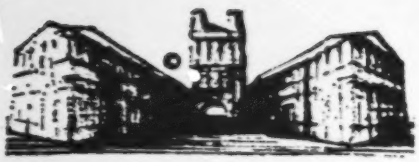
This report explores the implications of the Supreme Court's decision in the case of "'Miami Herald' v. Tornillo" concerning the "right of reply," the Florida mandate that allowed a candidate for nomination or election whose personal character or official record is assailed to publish a response at the expense of the newspaper in which the charges were made. The Court reasoned that, in the case of the print media, the "right of reply" constituted a compulsion to print and was thus unconstitutional. Two tenable solutions to the problem of access to the print media are discussed: application of an antitrust theory to the press and the implementation of a "public utility theory," in which newspapers are made socially responsible through the addition of a provision for equal time. A model right-of-access statute details the specifics of this latter procedure. (KS)

****
* Documents acquired by ERIC include many informal unpublished *
* materials not available from other sources. ERIC makes every effort *
* to obtain the best copy available. Nevertheless, items of marginal *
* reproducibility are often encountered and this affects the quality *
* of the microfiche and hardcopy reproductions ERIC makes available *
* via the ERIC Document Reproduction Service (EDRS). EDRS is not *
* responsible for the quality of the original document. Reproductions *
* supplied by EDRS are the best that can be made from the original. *
****

ED140323

U S DEPARTMENT OF HEALTH, EDUCATION & WELFARE
NATIONAL INSTITUTE OF EDUCATION

THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL NATIONAL INSTITUTE OF EDUCATION POSITION OR POLICY



SCHOOL OF JOURNALISM, UNIVERSITY OF MISSOURI AT COLUMBIA
APRIL 1975

FREEDOM OF INFORMATION CENTER REPORT NO. 0016

THE PRINT MEDIA AND EQUAL TIME

This opinion paper was written by DAVID M. HUNSAKER, Associate Professor of Speech Communication, University of Virginia. An earlier version of the paper was presented at the Western Speech Communication Association Convention, Newport Beach, California, November 1974.

On June 9, 1969, the United States Supreme Court issued an opinion which upheld the legal and constitutional validity of the so-called "Fairness Doctrine" promulgated by the Federal Communications Commission.[1] Justice White, writing for a unanimous Court[2] argued, "The right of free speech of a broadcaster, the user of a sound truck, or *any other individual* does not embrace a right to snuff out the free speech of others" (emphasis added)[3].

Such an analysis, reasoned the Court, was consistent with the First Amendment:

> It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than countenance monopolization of that market, whether it be by the Government itself or a private licensee. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here.[4]

Thus, while the decision dealt with and was limited to the peculiar problems of the electronic media, it rested upon a theory of the First Amendment which had a much broader application, articulated especially well by Justice Black in *Associated Press v. United States*: "Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests."[5]

Five years after the *Red Lion* decision upholding the FCC's fairness doctrine, the Supreme Court was asked to extend its philosophy of the First Amendment to the print media. The Supreme Court, for reasons which I view to be inconsistent with its prior announcements, declined to do so, and instead ruled that Florida's "right of reply" statute was unconstitutional.[6]

The purpose of this report is to examine the reasoning which the Court offers for its decision in *Miami Herald v. Tornillo*, and to argue that both public policy and the First Amendment compel a different result.

Background: 'Tornillo' Case

The facts of the case are as follows: in the Fall of 1972 Pat Tornillo, Jr., executive director of the Classroom Teachers Association was a candidate for the Florida House of Representatives. On September 20 and 29, 1972, the Miami *Herald* printed editorials critical of Tornillo's candidacy, principally because he led an illegal teacher's strike. Tornillo demanded that the *Herald* print his replies pursuant to the Florida right of reply statute. The newspaper refused and Tornillo brought suit in Dade County Circuit Court, asking for injunctive relief and damages.

Section 104.38 of the Florida Statutes provided that if a candidate for nomination or election is assailed regarding his personal character or official record by any newspaper the candidate has the right to demand that the newspaper print, free of cost to the candidate, any reply the candidate may make to the newspaper's charges. The reply must appear in as conspicuous a place and in the same kind of type as the charges which prompted the reply, provided it does not take up more space than the charges. Failure to comply with the statute's requirements constituted a first degree misdemeanor.

The State Circuit Court denied Tornillo's request for injunctive relief and held that the statute was unconstitutional as violative of the First and Fourteenth Amendments.[7] On direct appeal, the Florida Supreme Court reversed, holding that Sec. 104.38 did not violate constitutional guarantees.[8] It held that freedom of speech was enhanced, not abridged by the right of reply statute. The statute was considered to further the "broad societal interest in the free flow of information to the public."[9]

At the same time, the Florida Supreme Court refused to grant injunctive relief, agreeing with the Circuit Court that an injunction will not properly lie against the commission of a crime. Further, the Court construed the statute to impose certain limitations on the content of the reply:

> [W]e hold that the mandate of the statute refers to "any reply" which is wholly responsive to the charge made in the editorial or other article in a newspaper being replied to and further that such reply will neither be libelous, nor slanderous of the publication nor anyone else, nor vulgar nor profane.[10]

Reasoning of the Supreme Court

Upon appeal by the *Herald*, the United States Supreme Court reversed, upholding the decision of the Florida Circuit Court, and ruling that the Florida statute was fatally in conflict with the First Amendment guarantees of freedom of the press.

The reasoning of the Court is interesting. Chief Justice Burger, writing for a unanimous Court, declared that irrespective of the validity of arguments made by proponents of equal access to the media, any governmental mechanism which is designed to enforce a right of access is automatically unconstitutional, because it necessarily becomes a "compulsion to print." In suggesting the "government compulsion" argument as a crucial constitutional distinction, Chief Justice Burger commented,

> We see that beginning with *Associated Press* [*v. United States*] the Court has expressed sensitivity as to whether a restriction or requirement consti-

CS 203 459

> tuted the compulsion exerted by government on a newspaper to print that which it would not otherwise print. The clear implication has been that any such compulsion to publish that which "'reason' tells them should not be published" is unconstitutional. A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution, and like many other virtues it cannot be legislated.[11]

The Court characterizes the Florida statute as compulsory because it "exacts a penalty on the basis of the content of the newspaper.[12] One level of penalty is obvious: the exaction of a fine for non-compliance with the statute also exacts a penalty in the form of added costs of printing and composing time and materials, "and in taking up space that could be devoted to other material the newspaper may have preferred to print."[13]

But the argument concerning compulsion to print is not in itself compelling. One need only turn to the areas of product labelling and securities regulation to see the extent of governmental compulsion to print in operation. The Federal Trade Commission and the Food and Drug Administration both compel the printing of certain information on labels, such as ingredients and warnings. Similarly, the Securities Exchange Commission compels the publishing of significant information concerning the economic position of a company wishing to issue securities to the public. Such laws and regulations are designed to protect the consumer against fraud and injury, but they also have the effect of exacting a penalty from producers in the form of added printing costs and materials. Indeed, a similar argument was made by the Court during the 1973 Term in justifying state regulation of pornographic materials.[14]

Chilling Effect of Access Laws

The Court then suggests that compulsion, if not a harm in itself, would be counterproductive to the goals of right of access advocates:

> Faced with the penalities that would accrue to any newspaper that published news or commentary arguably within the reach of the right of access statute, editors might well conclude that the safe course is to avoid controversy and that, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced. Government enforced right of access inescapably "dampens the vigor and limits the variety of public debate."[15]

Thus the Court argues that right of access statutes produce a "chilling effect" on the print media. The value judgment is that it is better to have one side of an issue covered than neither side. The axiological foundations of this judgment are debatable of course, but the Court's predictions concerning the likelihood of the press to abandon coverage completely is without factual support. If anything, there is evidence to the contrary from parallel situations.

It would be foolish to assume, for example, that because businesses are compelled by federal law to supply information to consumers in the marketing of products and securities, such businesses would choose not to market products or securities. More to the point is the experience of the electronic media under the fairness doctrine since the *Red Lion* decision. Rather than becoming increasingly reluctant to present controversial viewpoints, the electronic media have proliferated the air waves with program material which six years before had been regarded as too controversial. Even in the case of Section 315 of the Federal Communications Act, the "Equal Time" provision, broadcasters have not been reluctant to discuss the qualifications of candidates and to cover their campaigns, although by doing so, the provisions of Sec. 315 may be brought into operation. To be sure, broadcasters seldom "endorse" candidates for political office as do newspapers, but this reluctance is not imposed by governmental regulation; rather, it is imposed by the realities of the Nielsen ratings and the exclusive dependence of broadcasters upon advertising revenues.

The only situation where Sec. 315 produces a chilling effect on broadcast coverage is where network time is provided free to candidates for purposes of televised debates, as in the case of the Kennedy-Nixon debates. The demands of numerous third party candidates would prevent any coverage of this sort because of time and cost considerations. In 1960 Congress suspended the operation of Sec. 315 to allow the Kennedy-Nixon debates.[16] Scholars in various fields continue to dispute the degree of useful information generated by those debates, and the degree of significance which those debates had on voting behavior in the 1960 presidential election.

It also should be remembered that the possibility of a chilling effect on the dissemination of controversial viewpoints has deterred neither Congress nor the Supreme Court from acting to guarantee a right of access to the electronic media in the form of the equal time provision and the fairness doctrine. Why the print media should be treated in the same manner is a question which I shall address below.

Interference with Editorial Function

In what purports to be a third and finale rationale for striking down the Florida right of access statute, the Court argues that the statute unavoidably intrudes into the function of editors. Such intrusion, in the Court's reasoning, is totally inconsistent with the provisions of the First Amendment:

> A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size of the paper, and content, and treatment of public issues and public officials—whether fair or unfair—constitutes the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they evolved to this time.[17]

These three arguments comprise the total rationale of the Court as to why right of access statutes are unconstitutional. Taken alone, and without reference to Supreme Court pronouncements in related areas, or, indeed, in reference to the technological and economic realities of contemporary journalism, these arguments may appear convincing, especially in light of Mr. Justice Stewart's "Fourth Estate" theory of the freedom of the press clause.

In a speech before the Yale Law School Sesquicentennial Convention which was reprinted in the Washington *Post* (11-11-74), Justice Stewart, in supporting the *Tornillo* decision, argued that,

> the free press guarantee is, in essence, a *structural* provision of the Constitution. . . . [I]t extends protection to an institution. The publishing business is, in short, the only organized private business that is given explicit constitutional protection.

Justice Stewart also suggested that it is a mistake to believe that the "only purpose" of the free press clause is to ensure that a newspaper will serve as a "neutral forum for debate, a 'marketplace for ideas,' a kind of Hyde Park corner for the community," or that the press is "a neutral conduit of information" between the public and its elected leaders. "These theories," argued the Justice, "give insufficient weight to the institutional autonomy of the press that it was the purpose of the Constitution to guarantee."

The 'Fourth Estate' Theory and the Court

In effect, what Justice Stewart, as spokesman for the Court, was advocating, was a "Fourth Estate" theory of freedom of the press:

> The primary purpose of the Constitutional guarantee of a free press was . . . to create a fourth institution outside the government as an additional check on the three official branches. . . .
>
> It is this constitutional understanding, I think, that provides the unifying principle underlying the Supreme Court's recent decisions dealing with the organized press.

I contend that such a theory is not a unifying principle, as Justice Stewart posits, and, far from being a neutral principle of constitutional law, the fourth estate theory smacks of "mechanical jurisprudence," and is exceedingly dangerous in potential application. As a unifying principle, the fourth estate metaphor is too narrow, for it can only be extended to explain decisions regarding newspapers, and not electronic news reporting, or the non-journalistic press. In the case of the electronic media, public policy, as enacted by Congress and upheld by the Supreme Court, clearly validates the "marketplace of ideas" or "open forum" theory rejected by Justice Stewart. With respect to publishing houses not engaged in news reporting, the Supreme Court held only last term that States may constitutionally prohibit the publication of plain cover, non-illustrated books which are "obscene" or pornographic in content.[18]

Nor is the theory a neutral principle of constitutional law; rather, it is based upon the assumption that the press, as an institution, is a *natural antagonist* or "watchdog" of government, and can always be expected to act as a check on the three branches of government, if given complete autonomy to do so. Historically, this has been true, and Justice Stewart, with obvious reference to Watergate, notes (Washington *Post*, 11-11-74) that the American press, "particularly in the last two years, has performed precisely the function it was intended to perform by those who wrote the First Amendment."[19]

But it is not necessarily true. It is not impossible to imagine that at some time in the future the interests of the press and the government will be conjoined. On such an occasion, the underlying "watchdog" rationale of the fourth estate metaphor evaporates, and the liberty of the people becomes jeopardized.

'Marketplace' Theory Serves First Amendment

On the other hand, the "marketplace" metaphor with a contemporary economic interpretation, would generate a constitutional policy much more directly related to the purposes of the First Amendment which the framers had in mind. This theory, originated by Jefferson, was first developed by the Supreme Court in a footnote to *United States v. Carolene Products Co.*[20] Justice Stone, later Chief Justice, in upholding the doctrine of presumed validity of economic regulation of interstate commerce, noted that such a doctrine might not apply when considering legislation impinging upon democratic processes:

> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.[21]

We all give lip service to the principle that freedom of speech and press is the cornerstone of democratic government; but we may forget the underlying rationale for such a principle: without a *guaranteed forum* for the expression of ideas which challenge traditional views, democracy quickly becomes autocracy, as the majority in power attempts to consolidate and perpetuate its position against encroachment by competing factions currently in the minority.

Of course Justice Stone was speaking of *legislation* which restricts the political process, and not private restrictions. But if our goal is to maintain the open society, then we should be concerned with any form of restriction on the political process. Indeed, neither Congress nor the Supreme Court has been prevented by the "State Action" clause of the Fourteenth Amendment from reaching and prohibiting *private* acts of discrimination against minorities. Nor should they be prevented from reaching and prohibiting private acts of restricting freedom of expression.

It is my contention that the "marketplace" theory of Jeffersonian democracy established in the *Carolene Products* case and reiterated in the *Red Lion* case, is the proper view of the First Amendment as it relates to freedom of the press, and not the mechanical, monolithic view of the press embraced by Justice Stewart as a fourth branch of government, minus the checks and balances imposed on the other three. I submit that the vast majority of Supreme Court decisions on First Amendment issues supports the former view,[22] the most pertinent of which is the *Red Lion* case itself.[23]

Given the validity of the preceding arguments supporting the marketplace theory of the First Amendment, is there a documented need for a government-enforced right of access to the print media? The documentation comes from the pages of Chief Justice Burger's opinion[24] in the *Tornillo* decision. This body of evidence is presented by the Court without comment or refutation. The Court simply responds that no matter what the harm to democratic processes caused by lack of guaranteed access,

the First Amendment acts as a complete bar to any government action initiated to remedy the harm. This position, as we have seen, is based upon a questionable theory of the purpose of the First Amendment.

Arguments of Access Advocates

The first argument made by access advocates is that newspapers have become big business with monopolistic characteristics:

> Chains of newspapers, national newspapers, national wire and news services and one-newspaper towns, are the dominant features of a press that has become non-competitive and enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events.[25]

The result of such consolidation and monopolization, together with the recent trend toward "advocacy journalism" has been "to place in a few hands the power to inform the American people and shape public opinion."[26] Along with accumulations of power has come inevitable abuses of bias and manipulative reportage. We need only recall the fiasco of the Muskie campaign in the New Hampshire primary to see the degree of influence which a single, but powerful newspaper has on State and national politics. Even Justice Douglas, a First Amendment absolutist, has expressed concern over the increasing monopolization of the press:

> Where one paper has a monopoly in an area, it seldom presents two sides of an issue. It too often hammers away on one ideological or political line, using its monopoly position not to educate people, not to promote debate, but to inculcate its readers with one philosophy, one attitude—and to make money. . . . The newspapers that give a variety of views and news that is not slanted or contrived are few indeed. And the problem promises to get worse. . . .[27]

The second argument concerns the ability of the private sector to counteract this monopolistic trend. Chief Justice Burger in his opinion notes that,

> the same economic factors which have caused the disappearance of vast numbers of metropolitan newspapers have made entry into the marketplace of ideas served by the print media almost impossible.[28]

One might respond that while creation of a competing newspaper is technologically and economically infeasible, alternative competing media, less costly and more individualistic, are available for the dissemination of views which would not otherwise be heard. The mimeograph, the poster, the handbill and the sound truck are alternative, competing media which are far less costly to employ. But as Justice Jackson remarked in *Kovacs v. Cooper*, "The moving picture screen, the radio, the newspaper, the handbill, the sound truck, and the street corner orator have differing natures, values, abuses and dangers. Each, in my view, is a law unto itself. . . ."[29] Two years later Justice Jackson reformulated this observation into a test for dealing with freedom of speech issues arising from different media: "The vulnerability of various forms of communication to community control must be proportioned to their impact upon other community interests."[30]

Professor Jerome Barron of the George Washington University Law School embraces Justice Jackson's formula, and argues (*Harvard Law Review*, 6-67) that the availability of a public park or sound truck does not compensate an advocate who is denied access to the only newspaper in town:

> Competitive media only constitute alternative means of access in a crude manner. If ideas are criticized in one forum the most adequate response is in the same forum since it is most likely to reach the same audience. . . .
>
> The test of a community's opportunities for free expression rests not so much in an abundance of alternative media but rather in an abundance of opportunities to secure expression in media with the largest impact.

Two Ways to Provide Access

Two solutions to the problem are possible. The first is the application of an anti-trust theory to the press, as established in *Associated Press v. United States*.[31] Justice Black, in an opinion which upheld anti-trust convictions against the AP wrote that the First Amendment

> . . . rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom.[32]

Such a solution would be in effect a "trust-busting" of national newspaper chains, news syndicates and wire services, allowing others to enter the relatively closed market of news dissemination.[33]

The other solution is the application of a "public utility" theory to the print media, established in principle by *Red Lion Broadcasting Co. v. F.C.C.*[34] There the Court admitted the need for limited governmental control of news dissemination and programming because the economic and technological realities of broadcasting prevented all but a few people from entering the business. Since access to the electronic media was limited, the First Amendment required that dissemination of information should be balanced and varied. Owners of broadcasting stations and national networks undertook fiduciary obligations toward the public, and were required to operate, as are all public utilities granted monopolistic privileges, "in the public interest."

Public Utility Theory Preferred

Our choice, then, is either to break up the monopolies which dominate the print media, or make them socially responsible. I endorse the latter option and suggest an "equal time" provision for the print media for several reasons. First, the demonopolization of newspaper chains, syndicates, and wire services in no way guarantees that balanced views on contemporary public issues will emerge. New ownership of AP and UPI would not necessarily mean new editorial policies.

Second, the anti-trust solution could do nothing about

the problem of the one-newspaper town. A newspaper is a single entity, rather than a conglomerate. There is no practical way for it to divest some of its holdings to comply with anti-trust legislation.

Third, given the economic realities of the times, it may be impossible for a news syndicate to be broken up and have the pieces remain in business. Indeed, the increasing number of newspapers going out of business for economic reasons prompted Congress to exempt newspapers from certain provisions of the anti-trust laws.[35] Thus, demonopolization may exacerbate, rather than remedy the problem.

Both federal and state governments have recognized that certain service industries, such as water and power, telephones and transit, cannot provide effective service to consumers in a competitive market setting. The solution has been to grant monopolistic privileges to such industries, but to place them under at least minimal governmental control and regulation. We are faced with an analogous situation with the print media. News reporting in a technological society may no longer be feasible without vast resources and organization. But faced with the necessity of a monopoly we need not refrain from requiring that monopoly to act in the public interest.

By suggesting such a remedy I do not mean to imply either that the solution is simple or that real dangers do not exist in right of access legislation. I argue, rather, that the absolutistic position taken by the Supreme Court is not an adequate answer to so basic an issue, nor is it in keeping with the "balancing" approach characteristic of the current and preceding Courts.[36] It may be impossible to draft a statute compelling newspapers to act "in the public interest," giving balanced coverage to all issues of public concern without meeting insurmountable obstacles of vagueness and overbreadth, or without the creation of a regulatory body which, in effect, substitutes its editorial judgments for those of the publisher. But such a sweeping change is not required to combat the basic dangers to the political process which the monopolization of the print media poses. Primarily, we are concerned, as was the state of Florida, with ensuring that candidates for political office and sponsors or opponents of legislative measures submitted to the electorate have an effective opportunity to present their positions to the public, without being frustrated by a powerful and hostile newspaper antagonistic to those positions.

Improving the Florida Statute

Admittedly, the Florida statute may have been defective in meeting this objective, by employing terminology and standards too vague to withstand scrutiny under the Due Process clause of the Fourteenth Amendment. It is therefore incumbent upon those who advocate a government-enforced right of access to the print media to propose legislative models which would further the objectives of the marketplace theory of the First Amendment, while at the same time providing adequate safeguards against the kind of governmental encroachment which the First Amendment was also designed to prevent.

The following model provision represents a possible approach to the problem of access to the print media.

MODEL RIGHT OF ACCESS STATUTE

Sec. 101. Definitions. *Whenever used in this subchapter, unless otherwise expressly indicated, the following terms shall have the respective meanings set forth or indicated:*

a. candidate. *The term, "candidate," means any person seeking to fill an elective office who meets the requirements for candidacy to that office set forth in the laws of this State or of the United States.*

b. initiative. *The term, "initiative," means any legislative measure proposed by a citizen or group of citizens of this State which complies with the provisions of the Election Laws of this State and is submitted to the public for a vote in a general or special election.*

c. newspaper. *The term, "newspaper," means any printed material, published or distributed within this State on a regular or periodic basis, devoted in whole or in part to the reporting of facts and events of current interest to the public at large.*[37]

d. public office. *The term, "public office," means any municipal, county, State or federal office requiring election by the citizens of this State.*

e. referendum. *The term, "referendum," means any legislative measure or bond issue submitted by the Legislature of this State, or by any municipal corporation, county government, or special district chartered under the laws of this State, to the public for a vote in a general or special election.*

Sec. 102. According access to opposing candidates for public office. *Any newspaper which endorses or otherwise recommends the election of a specific candidate to a public office, or which provides space with or without cost to another for such purpose, may not refuse, as a matter of editorial policy, to sell space in its publication to opposing candidates for the same office for the purpose of political advertisement at a rate not exceeding that charged for commercial or other political advertisements.*

Sec. 103. According access to persons opposing editorial position on initiatives and referendums. *Any newspaper which endorses or otherwise recommends a specific vote on an issue contained in an initiative or referendum election, or which provides space with or without cost to another for such purpose, may not refuse, as a matter of editorial policy, to sell advertising space to those opposed to such endorsement or recommendation for the purpose of expressing such opposition, at a rate not exceeding that charged for commercial or other political advertisements.*

Sec. 104. According space for reply to candidate assailed by newspaper. *Any newspaper which assails the personal character of any candidate for public office, or charges said candidate with malfeasance or misfeasance in office, or otherwise recommends a vote against said candidate, or gives to another free space for such purpose, shall upon request of said candidate, publish free of cost in its next regular issue any reply said candidate may make to such charges, subject to the following provisions:*

a. *the reply must be wholly responsive to the charges made by the newspaper or other person accorded free space in the newspaper being replied to;*

b. *the reply may not be libelous of the newspaper nor of anyone else;*

c. *the reply must be in as conspicuous a place and in the same kind of type as the charges replied to;*

d. *the reply may not take up more space than the matter replied to.*

Sec. 105. Penalties for violation. *Any editor or publisher who fails to comply with the provisions of this subchapter shall be guilty of a misdemeanor, punishable by a*

fine of not less than five thousand ($5,000) *dollars, nor more than ten thousand* ($10,000) *dollars.*

Sec. 106. Affirmative defense. *In any criminal proceedings brought under sections* 102 *and* 103 *of this subchapter, it shall be an affirmative defense to such criminal proceedings that no advertising space was available in any issue published or scheduled for publication prior to the election for which the candidate seeks office.*

Sec. 107. Civil remedies; limitation. *Any candidate for public office who is denied access to publication space by a newspaper in violation of sections* 102 *and* 104 *of this subchapter may bring an action in civil court against said newspaper for money damages, subject to the following provisions:*

a. *only actual damages may be recovered;*

b. *the amount of damages recovered may not exceed fifty thousand* ($50,000) *dollars;*

c. *excepting an action for libel, this remedy is in lieu of any other remedy in law or in equity.*

Advantages of the Model Statute

The above statute removes some of the difficulties found in the Florida right of access statute.[38] A distinction is made, for example, between the obligations imposed on a newspaper which merely endorses a candidate without attacking his opponents and the obligations imposed on a newspaper which attacks the character or record of a candidate in the process of endorsing his opponent. Sanctions in the former instance are limited to those situations where a newspaper refuses as a matter of editorial policy to allow an opposing candidate to purchase advertising space for his or her campaign, and the candidate must pay the going rates for advertising. Fair play and the necessity of open debate on the qualifications of candidates seeking public office require stricter sanctions in the latter situation, where a newspaper utilizes its editorial function to attack a candidate and at the same time denies him any opportunity to respond. The model statute also provides clearer standards as to what constitutes a denial of the right of access, and specifies what constitutes an affirmative defense in the case of refusal to sell advertising space. Finally, the concept of right of access is broadened to include initiatives and referendums which in many states, such as California, are becoming an important vehicle for legislative policy-making. Even in those states which do not have the statewide initiative or referendum, local bond issues which may affect the future of a community's educational system require full and open debate. A newspaper which has no competition in a community may, through its editorial policies, make or break a bond issue having far-reaching consequences for that community.

No one but the most extreme advocate of *laissez faire* economics would urge a return to the days when the Rockefellers, the Carnegies and the J. P. Morgans controlled the economic fate of millions of people from vast empires of accumulated wealth and power. In order for free enterprise to remain free, monopolies had to be broken up or brought under control. Similarly, the free marketplace of ideas must be controlled to some extent if it is to serve the purposes of a democracy. We have found that pure *laissez faire* economics soon breeds cannibalistic monopolies which eat up the competition responsible for their existence. We can no longer afford to permit pure *laissez faire* in the print media for the same reason. Guaranteed competition of ideas is even more essential to liberty than guaranteed competition in the production of goods and services. The United States Supreme Court, as guardian of the open society, cannot choose to ignore a basic threat to that society and remain consistent with the purpose of the First Amendment.

FOOTNOTES

1. *Red Lion Broadcasting Co., Inc. v. F.C.C.*, 395 U.S. 367 (1969). See D. Mullally, "Broadcasting and Social Change," *Quarterly Journal of Speech*, 51 (1970), pp. 40-44.
2. Not having heard oral argument in the two cases, Mr. Justice Douglas took no part in the Court's decision.
3. 395 U.S. 367, 387 (1969).
4. *Ibid.*, p. 390.
5. *Associated Press v. United States*, 326 U.S. 1, 20 (1945). The decision held that restraints on dissemination of news gathered by the AP contained in its By-laws was a violation of the Sherman Anti-Trust Act, which was in no way affected by the First Amendment.
6. *Miami Herald Publishing Co., v. Tornillo*, 418 U.S. 241, (1974).
7. *Tornillo v. Miami Herald Publishing Co.*, 38 Fla. Supp. 80 (1972).
8. *Tornillo v. Miami Herald Publishing Co.*, 287 So.2d 78 (1973).
9. *Ibid.*, p. 82.
10. *Ibid.*, p. 86.
11. 418 U.S. 241, at 256.
12. *Ibid.*
13. *Ibid.* "It is correct, as appellee contends, that a newspaper is not subject to the finite technological limitations of time that confront a broadcaster, but it is not correct to say that, as an economic reality, a newspaper can proceed to infinite expansion of its column space to accommodate the replies that a government agency determines or a statute commands the readers should have available."
14. "Most exercises of individual free choice—those in politics, religion, and expression of ideas—are explicitly protected by the Constitution. Totally unlimited play for free will, however, is not allowed in our or any other society. We have just noted, for example, that neither the First Amendment nor 'free will' precludes States from having 'blue sky' laws to regulate what sellers of securities may write or publish about their wares. . . . Such laws are to protect the weak, the uninformed, the unsuspecting, and the gullible from the exercise of their own volition. Nor do modern societies leave disposal of garbage and sewage up to the individual 'free will,' but impose regulation to protect both public health and the appearance of public places. States are told by some that they must await a 'laissez faire' market solution to the obscenity-pornography problem, paradoxically 'by people who have never otherwise had a kind word to say for laissez faire,' particularly in solving urban, commercial, and environmental pollution problems." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 at 64 (1973).
15. 418 U.S. 241 at 257.
16. P.L. 86-677, 74 Stat. 554 (August 24, 1960).
17. 418 U.S. 241 at 258.
18. *Kaplan v. California*, 413 U.S. 115 (1973).
19. It could well be argued that the role of the press in the Watergate affair was not so much anti-government as primarily anti-Nixon, and secondarily, anti-corruption. Documented examples of corruption and "dirty tricks" on the part of the Democrats failed to evoke anything like the mass coverage of Watergate.
20. 304 U.S. 144 (1938).
21. *Ibid.*, p. 152, n. 4.
22. See, for example, *Abrams v. United States*, 250 U.S. 616 (1919): "[T]he best test of truth is the power of thought to get itself accepted in the competition of the market. . . ." (Holmes, J., dissenting); *Gitlow v. New York*, 268 U.S. 652 (1925) (Holmes, J., dissenting); *Near v. Minnesota*, 283 U.S. 697 (1931): "[T]he protection [of the First Amendment] even as to previous restraint *is not absolutely unlimited*" [emphasis added]; *Times Film Corp. v. Chicago*, 365 U.S. 43 (1961).
23. *Red Lion Broadcasting Co., v. F.C.C.*, 395 U.S. 367 at 390 (1969).
24. Six and one-half pages of the seventeen-page majority opinion are devoted to the presentation and documentation of the access advocates' position with respect to the print media.
25. 418 U.S. 241 at 249. The Court cites Balk, Background Paper, Twentieth Century Fund Task Force Report for a National News Council, *A Free and Responsive Press* (New York, 1973), p. 18: "Nearly half of U.S. daily newspapers, representing some three-fifths of daily and Sunday circulation, are owned by newspaper groups and chains, including diversified business conglomerates. One newspaper towns have become the rule, with effective competition operating in only 4 per cent of our large cities."
26. *Ibid.*, at 250. See B. Bagdikian, *The Information Machines: Is Print Dying?* (New York: Harper & Row, 1971), p. 127.
27. *The Great Right* ed. E. Cahn, (New York, 1963), pp. 124-25, 127.
28. 418 U.S. 241 at 251.
29. *Kovacs v. Cooper*, 336 U.S. 77, at 97 (1949) (Jackson, J. concurring).
30. *Kunz v. New York*, 340 U.S. 290 at 307-308 (1951) (Jackson, J., dissenting).
31. 326 U.S. 1 (1945).
32. *Ibid.*, p. 20.
33. It should be noted that Chief Justice Burger specifically rejects the extension of *Associated Press* to the concept of right of access. 418 U.S. 241 at 254.
34. 395 U.S. 367 (1969).
35. 15 U.S.C. Sec. 1801 *et seq.*
36. Of those justices who entertained an absolutist position on the First Amendment, only Justice Douglas remains. The vast majority of decisions reflect attempts by the Court to balance legitimate State interests with those of the individual. See for example, Dennis v.

United States, 341 U.S. 494 (1951); *United States v. O'Brien*, 391 U.S. 313 (1968); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).

37. The definition thus removes in-house journals, single issue brochures and pamphlets, and weekly advertisers from the meaning of the term, "newspaper."

38. Sec. 104.38 of the Florida Statutes provides: "*Newspaper assailing candidate; space for reply*—If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate, immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in Sec. 775.802 or Sec. 775.803."